



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A&MH-S-, INC.

DATE: MAR. 9, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a hotel services business, seeks to employ the Beneficiary as an economic analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner had the continuing ability to pay the Beneficiary the proffered wage from the priority date. *See* 8 C.F.R. § 204.5(g)(2).

On appeal, the Petitioner asserts that it has established its ability to pay the proffered wage based on the totality of the circumstances. Upon *de novo* review, we will withdraw the decision of the Director and remand the matter for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).¹ *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

¹ The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is May 18, 2016. *See* 8 C.F.R. § 204.5(d).

II. ABILITY TO PAY THE PROFFERED WAGE

In determining a petitioner's ability to pay the proffered wage, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage. On appeal, the Petitioner submits its federal income tax return for 2016, the year of the priority date, which indicates that the Petitioner's net current assets of \$66,935 exceeded the proffered wage of \$59,634 in that year. As such, the Petitioner has demonstrated its ability to pay the proffered wage from the priority date. *See* 8 C.F.R. § 204.5(g)(2). We will withdraw the Director's decision on this issue. However, for the reasons that follow, we do not find the petition approvable.

III. BONA FIDE JOB OPPORTUNITY

The record does not appear to establish the *bona fides* of the job opportunity. A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*); *see* 20 C.F.R. § 656.17(l).² A relationship between a petitioner and a beneficiary triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship."

² The regulation at 20 C.F.R. § 656.17(l) states in pertinent part:

(l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
- (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
- (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
- (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

Matter of Sunmart 374, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000). If a petitioner knowingly misrepresented the *bona fides* of a job opportunity, USCIS may invalidate a labor certification after its issuance. See 20 C.F.R. § 656.30(d) (authorizing USCIS invalidation upon a finding of “fraud or willful misrepresentation of a material fact involving the labor certification”).

In order to assess whether a job offer is *bona fide*, Part C.9 of the labor certification asks, “Is the employer a closely held corporation... in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?” The Petitioner checked ‘No’ in response to this question, indicating that there is no relationship between the Beneficiary and the owners, stockholders, partners, corporate officers, or incorporators of the Petitioner. However, the record reflects that the Beneficiary may be related to the Petitioner. In a March 2015 visitor visa interview at the U.S. Embassy in [REDACTED] the Beneficiary told a U.S. government official that he would be visiting a cousin who owns hotels in Michigan. If the Beneficiary is the cousin of the Petitioner’s owner, the Petitioner misrepresented the answer to Part C.9 of the labor certification, and the job opportunity may not be *bona fide*.

On remand, the Director should request evidence of the *bona fides* of the job opportunity, including documentation relating to the Beneficiary’s relationship with the Petitioner’s owners, stockholders, partners, corporate officers, or incorporators. The Director should also consider whether the labor certification should be invalidated based on a willful misrepresentation of a material fact.

IV. CONCLUSION

The decision of the Director regarding the Petitioner’s ability to pay will be withdrawn. The matter is remanded to the Director for consideration of the existence of a *bona fide* job opportunity. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of A&MH-S-, Inc.*, ID# 504685 (AAO Mar. 9, 2018)